

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DYNAHEALTH, INC.

PLAINTIFF

vs.

Civil Action No. 1:95cv25-D-D

HOME HEALTH SPECIALISTS,
INC., d/b/a ROBERTS HOME
HEALTH, INC., JIM ROBERTS
and SALLIE G. ROBERTS,
individually, and d/b/a HOME
HEALTH SPECIALISTS, INC.,
d/b/a ROBERTS HOME HEALTH, INC.

DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the plaintiff to remand this action to the Circuit Court of Lowndes County, Mississippi. Finding the motion well taken, the same shall be granted.

FACTUAL BACKGROUND

The plaintiff originally filed this breach of contract action in the Circuit Court of Lowndes County, Mississippi on or about December 29, 1994. The defendants subsequently removed the action on January 24, 1995, alleging as a basis for this court's jurisdiction diversity of citizenship between the parties. The defendants moved this court for a change of venue to the United States District Court of West Virginia, which this court denied by order dated April 3, 1995. The plaintiff has now moved the court to remand this action to the Circuit Court of Lowndes County, Mississippi, stating that the amount in controversy in this matter

is insufficient to meet the requirements of federal jurisdiction, and that the defendants have waived their right to remove this action to federal court. The defendants have wholly failed to respond to the plaintiff's motion.

DISCUSSION

I. AMOUNT IN CONTROVERSY

No federal question jurisdiction has been asserted by the parties. The initial matter in dispute is whether this case satisfies the requirements of federal law to allow for the application of diversity jurisdiction pursuant to 28 U.S.C. § 1332.

The first argument of counsel center not around the diversity of the parties, but rather the jurisdictional amount involved. In order to invoke diversity jurisdiction, one requirement is that the amount in controversy be in excess of \$50,000.00.

The determination that must be made is whether this court would have had original jurisdiction to hear this action if the case had been filed here instead of state court. Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972); 28 U.S.C. § 1332. To determine whether this jurisdiction existed, "the general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.'" Horton v. Liberty Mutual Insurance Company, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573,

6 L.Ed.2d 890 (1961).

The plaintiff's complaint prays for relief in the amount of \$48,302.00. Since this amount is below this court's jurisdictional limit of \$50,000.00, the plaintiff contends, the amount in controversy requirement is not met here. The plaintiff has apparently forgotten that it has also asked in its complaint for an award attorney's fees, which are considered in determining the jurisdictional amount. Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990); Graham v. Henegar, 640 F.2d 732, 735 (5th Cir. 1981). The defendant need not show a lack of good faith here, but must instead must show that the amount of the plaintiff's claim is in excess of the required jurisdictional amount. The extent of the defendant's burden on in this regard is unclear under Fifth Circuit law¹, but the uncertainty poses no dilemma for this court in the case at bar. Regardless of the

¹ The Fifth Circuit did resolve this issue at one point, choosing to place a heavy burden upon the defendant. Kliebert v. Upjohn Co., 915 F.2d 142, 146 (5th Cir. 1990) ("To establish plaintiff's bad faith and sustain federal court jurisdiction in this case we hold, therefore, that the defendants [are] required to establish that the plaintiff would, if successful, recover at least the minimum jurisdictional amount.") In contrast, Judge Jolly opined in his dissent that a better standard would be one where the defendant need only show that the plaintiff's claim was **probably** in excess of the jurisdictional amount. Kliebert, 915 F.2d at 147. However, this decision does not bind this court as precedential authority, in that the decision was later vacated by the Fifth Circuit. Kliebert v. Upjohn Co., 923 F.2d 47, 47 (5th Cir. 1991). The case was later settled by the parties, and the court never readdressed the issue. Kliebert v. Upjohn Co., 947 F.2d 736, 737 (5th Cir. 1991).

degree of the burden placed upon the defendants, they cannot carry it without making submissions to this court. In the case at bar, the defendants would only need to establish that the plaintiff's claim for attorney's fees, coupled with the specific prayer for relief, was in excess of this court's \$50,000.00 jurisdictional limitation. They have not, however. Without any proof from the defendant that the plaintiff's claim is in excess of the jurisdictional limitation, the plaintiff's motion to remand this action must be granted.

II. CONTRACTUAL PROVISIONS

The plaintiff's second asserted ground for remand of this cause is the inclusion of the following provisions in the contract which is the subject-matter of the action at bar:

Agency specifically agrees and understands that the Agreement shall be governed by the laws of the State of Mississippi and any suit or litigation resulting from the violation of the terms and provisions of said Agreement by either party shall be brought in Lowndes County, Mississippi . . .

[S]hould it become necessary for either party to enforce any of the terms of this Contract by suit, venue for such action shall be Lowndes County, Mississippi.

The plaintiff contends that as a forum-selection clause, the second provision "is prima facie valid and should be enforced unless the defendants can show that enforcement is unreasonable." First Mississippi Corp. v. Thunderbird Energy, Inc., 1995 WL 61277 (S.D. Miss. Feb. 13, 1995) (citing Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 799 (5th Cir. 1990)). Had the plaintiff timely

responded to the defendants' earlier motion to transfer venue so the court could consider the response before it ruled, this matter as the plaintiff argues it could have also been discussed. In the present context, the analysis is not quite as simple.

What the plaintiff does in fact in its veiled argument is claim that the defendants have waived their right to remove this action to federal court. The waiver of a party's right to remove an action to federal court must be clear and unequivocal. See, e.g., Tennessee Gas Pipeline Co. v. Continental Cas. Co., 814 F.Supp. 1302, 1307 (M.D. La. 1993). The Fifth Circuit, however, has upheld a contractual waiver of federal removal. City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13 (5th Cir. 1991). This court voices no opinion as to whether the contents of the waiver provision in Rose City are the minimal requirements for such a waiver, but the court does note that the waiver provision in Rose City was more artfully drafted than the ones in contention in the case at bar. In any event, the resolution of the issue is not required of this court today, for remand of this case is proper on other grounds.

CONCLUSION

In that the defendants have wholly failed to respond to the plaintiff's motion to remand, they cannot carry their burden of proof in this matter to establish that the plaintiff's claim is for an amount in excess of the minimum jurisdictional limitation of

this court. The plaintiff's motion to remand this action to the Circuit Court of Lowndes County, Mississippi, shall be granted.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of May, 1995.

United States District Judge

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DEFENDANTS

ORDER GRANTING MOTION TO REMAND

Pursuant to a memorandum opinion issued this day, it is hereby
ORDERED THAT:

1) the motion of the plaintiff to remand this cause to the
Circuit Court of Lowndes County, Mississippi is hereby GRANTED.

2) this cause is REMANDED to the Circuit Court of Lowndes
County, Mississippi for further proceedings.

SO ORDERED, this the _____ day of May, 1995.

United States District Judge